

Exhibit #20



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Subject: Comments on Physicians' Panel Proposed Rule

Loretta

Attached are Chicago Operations Office comments on the proposed physicians' rule. Our comments also include issues raised to us by our Brookhaven (BNL) site. Please call me if you have any questions. Thanks.

<<CH Physicians Rule comments.doc>>



- CH Physicians Rule comments.doc

CHICAGO OPERATIONS OFFICE

Comments On:

Department of Energy Proposed Rule 10 CFR Part 852
Guidelines for Physicians Panel Determinations on Worker Requests
For Assistance in Filing for State Workers' Compensation Benefits

1. Proposed section 852.2 and Preamble section II.G. What Is a DOE Facility?

DOE solicits comments as to whether this broad view is appropriate for implementing Subtitle D of the Act.

CH Comment: Correlation of the definition of "DOE facility" to the list of covered facilities DOE has published in the Federal Register would seem to be a sound, logical approach and CH has no objection, so long as it is made clear that the definition *only* refers to those facilities on the list identified specifically as "DOE facilities" (as opposed to Beryllium Vendors).

2. Proposed section 852.2 and Preamble section II.L. What Is a Toxic Substance?

DOE solicits comments on its definition, including whether "toxic substance" should be defined more precisely.

CH Comment: The Preamble does not indicate the source of the proposed definition and alternative. We would recommend that an existing definition in broad usage be incorporated, to take advantage of the extensive epidemiological evidence that has been compiled demonstrating a connection between substances and illnesses or other abnormal health conditions. For example:

- a. The definition of "toxic" in 15 USC 1261(g) [*"Any substance (other than a radioactive substance) which has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface."*] is similar to the proposed definition [*"any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature."*], but has the added stature of Congressional endorsement.
- b. A simple reference to the "Registry of Toxic Effects of Chemical Substances" (RTECS) updated annually by NIOSH, in accordance with section 20(a)(6) of the OSHAct (29 USC section 669(a)(6)), would limit the "definition" to chemicals (consistent with the alternative definition), but would have the added credibility of NIOSH and OSHA behind it. The Registry is described as the list of "all known toxic substances which may exist in the environment," and currently contains the various chemical names of over 45,000 different chemicals, with associated toxicity and exposure route data.
- c. Another alternative is the definition of "hazardous chemical" in 29 CFR 1910.1450 [*"a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. The term "health hazard" includes chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents which act on the hematopoietic systems, and agents which damage the lungs, skin, eyes, or*

mucous membranes.”] Although it is not strictly a definition of ‘toxic substances,’ it takes a “method of proof” approach, which has the added benefit of listing a number of different categories of “toxins”.

Option 2., above (the RTECS) is our preference, especially if the Physician Panels applying the “definition” include employees of NIOSH. We also believe that the focus on chemicals is consistent with the Toxic Substances Control Act, which, although it does not define “toxic substance,” does express Congress’ intention to “set in place a comprehensive, national scheme to protect humans and the environment from dangers of toxic substances.”

3. **Proposed section 852.4(b)**

CH Comment: It may not be only the “health care providers and health care facilities” that may have information on “exposure to a toxic substance while employed at a DOE facility.” The phrase “the individual’s employer(s), and others” should be added.

4. **Proposed section 852.4(c)**

CH Comments:

This section is too “narrow” in that it only addresses records “under the control of DOE”. DOE contractor employment records and medical records (other than radiation exposure records) are not “DOE records” and are therefore “not under the control” of DOE. The phrase should be deleted.

It may be assumed that the employer would have the opportunity to provide any information relevant to the validity of the claim when DOE requests medical and employment records; however, it would be better if this section, or another section in the rule, expressly provide for employer input on the claim, and the earlier the better. If the employer has evidence that the claim is frivolous, and cannot contest the claim after a positive determination is accepted by the Program Office, some alternative needs to be provided.

5. **Proposed section 852.6 and Preamble section II.J. What Is a State Agreement?**

CH Comment: Proposed section 852.2 defines “State Agreement” as:

... an agreement negotiated between DOE and a State that sets forth the terms and conditions for dealing with an application for assistance under Subtitle D of the Act in filing a claim with the State’s workers’ compensation system... a State Agreement sets the parameters within which the Program Office can take action with respect to an application.

However, the three “provisions” identified in proposed section 852.6 do not satisfy the expectation created by this definition. First, provisions (b) and (c) merely repeat process information provided in sections 852.5 and 852.18, respectively. It is not necessary to repeat regulatory language in the State Agreements. Second, provision (a) reads more like a description of the opening phase of State/DOE-OWA negotiations than an Agreement term or condition.

To clarify that any "criteria and process" identified in the agreement will reflect the mutual agreement of the parties, and not just a State's unilateral identification, the following wording is recommended: "The criteria the State will use to determine the validity of a workers' compensation claim." To give appropriate effect to the statutory provisions, we would expect that at least two provisions would be included addressing State Agreements: (1) a waiver of any state Statute of Limitations; and (2) State agreement to accept a Panel's determination of causal connection.

If "pre-screening" is undertaken, CH recommends that section 852.6 make it clear that the State Agreements will define those standards that will be used for this screening of applications prior to submission to physicians panels for a causation determination, as well as identify who will do the pre-panel screening.

6. Proposed section 852.5 and Preamble section II.N. How Does the Program Office Decide What Applications to Submit to a Physicians Panel?

DOE invites comments on its proposal to rely on State standards to screen applications for assistance. For example:

- a. What other provisions should be included in State Agreements?*
- b. Should a State Agreement contain a provision under which the State would consider the opinion of a physicians panel on medical issues and, if appropriate, delay State proceedings in order to obtain such an opinion?*

As a general matter, DOE requests comments as to:

- a. whether the use of a screening mechanism is consistent with the statutory framework; and*
- b. whether the use of applicable State criteria or uniform Federal criteria better achieves the statutory objectives.*
- c. whether the proposed conditions are appropriate and what, if any, alternative or additional conditions should be used. In particular:*
 - (1) Should screening criteria exclude State timeliness requirements?*
 - (2) Should use of state criteria be limited to those related to the question of whether a disease arose from exposure to a toxic substance during employment at a DOE facility, and exclude other State criteria related to the broader question of whether an application presents a valid claim for compensation under the State's workers' compensation system? For example:*
 - Whether the disease originated from a hazard to which workers would have been equally exposed outside of the employment,*
 - whether there is a causal connection between the work conditions and the disease,*
 - whether the disease is peculiar to the occupation in which the employee is or was engaged,*
 - whether the disease was contracted after a period of exposure to the toxic substance specified under state law, or*
 - the level of medical probability that the disease was the material and direct result of the conditions under which the work was performed.*

CH Comment: Obviously, criteria (1) and (2) are appropriate. Regarding (3), we agree that it would not serve the program to burden the physicians panel process with applications that cannot pass some minimal threshold of factual adequacy regarding State requisites. However, the rule must be careful to avoid the paradox of requiring (through "screening" for

State requirements) "causal connection" as a prerequisite to referral to a Physicians Panel for a determination of causal connection. If a determination that an application will meet a State requirement of causal connection is a screening criterion, there would be no need to submit the application to a Physicians Panel. This is why section 852.6 (which is incorporated into the screening criteria through paragraph 852.5(c)), must require State "waiver" of any criteria related to causal connection in favor of the Panel's determination.

Contracting with States to do the initial screening (on a reimbursable basis) prior to submission of applications to the physician panels (thereby taking advantage of existing State infrastructure and expertise) would seem to be cost effective and not inconsistent with the law, which does not in any way restrict or alter State program requirements. This should not create an undue burden on the State, inasmuch as screening is actually reducing the number of claims the State would review. To minimize the burden, State screening could be limited to only those criteria that are State prerequisites. Meanwhile, the applicant's right to appeal a determination not to submit the application to the physicians panel (section 852.17(a)) would provide adequate opportunity for the Program Office to take an independent look at the State screening results.

7. **Proposed section 852.7 and Preamble section O. What Guidelines Does a Physicians Panel Use To Determine Whether an Illness Arose Out of and in the Course of Employment by a DOE Contractor and Exposure To a Toxic Substance at a DOE Facility?**

DOE solicits comments on whether the "more likely than not" (>50%) standard is the appropriate burden of proof for assistance under the DOE program (as opposed to, e.g., "as likely as not" (> 50%).

CH Comment: CH agrees that compensation should require more than an even chance that the illness was causally connected to DOE activities.

8. **Proposed section 852.7 and Preamble section O. What Guidelines Does a Physicians Panel Use To Determine Whether an Illness Arose Out of and in the Course of Employment by a DOE Contractor and Exposure To a Toxic Substance at a DOE Facility?**

DOE solicits comments on the extent, if any, to which physician's panels should be expected to examine criteria used in State workers' compensation proceedings.

CH Comment: CH concurs that consideration of State requirements is more cost-effective as a part of the screening process.

9. **Proposed section 852.7**

CH Comments:

The question here is not "how" (which really is addressed by section 852.11), but "What is the determination that the Physician's Panel is authorized to make?"

This section seems to require quite a number of "determinations": (1) the illness or death arose out of and in the course of employment by a DOE contract; (2) the illness or death arose out of exposure to a toxic substance at a DOE facility; (3) there is sufficient

information to support a prima only a statement of what the Physician's Panel's determination must include. In other words, The Physician's Panel must make a determination that there is sufficient evidence to support a prima facie case. What a prima facie case is probably going to be defined by State law or the MOU. Meanwhile, your proposed change is in the right direction, but is unnecessarily and inappropriately limiting, because the materials the panel must review (852.8) is more than just claimant and employer records or witnesses. For example, the Program Office and/or Panel may request information from health care providers, and 852.9 provides for "other" information. I stand by my previous opinion that the rule should include some express acknowledgement of employer input into the Panel's deliberations - strictly speaking, it's not a "valid claim" until the Panel says so, so prior to the Panel's determination it is not "contesting a valid claim" and there should be an opportunity for the employer to provide other information than strictly what has been requested. The way to approach this may be to provide for an employer's right to submit information (timely of course) to the Program Office.

10. Proposed section 852.7(a)

CH Comment: This section refers to a "prima facie case," but the elements of a "prima facie case" are not defined. Wouldn't these be the same "criteria" defined in the State Agreements? There needs to be a link between the two.

11. Proposed section 852.7(b)

CH Comment: This section refers to "A reasonable finding that it is more likely than not that exposure to a toxic substance at a DOE Facility during the course of employment by a DOE contractor caused the illness or death." This is based on prima facie evidence [as listed in 852.7(a)]. Suggest the language might be "A reasonable finding based on medical evaluation of the evidence produced by the claimant and the employer (records or witnesses) that it is more likely..."

12. Proposed section 852.8

CH Comments:

The Physician's Panel should not have the discretion to disregard some of the information provided by the Program Office. Likewise, in 852.11(c)(3), the Panel should not have the discretion to withhold any information from the Program Office, since that might be just the information from the Program Office would believe would constitute "significant evidence to the contrary" under 852.16(a). Change "should" to "shall" in both sections, and change "Any" to "All" in the latter section.

If the eventual determination by the Physician's Panel could wind up as a charge against the DOE contractor, the words "should" and "may" found in this section would have to be changed to "shall" and "will".

13. Proposed section 852.9 and Preamble section Q. How May a Physicians Panel Obtain Additional Information or consultations to make its determination?

DOE invites comment on the desirability of including regulations permitting such [development of medical evidence.].

CH Comment: Theoretically, DOE's authorization to determine appropriate composition of physicians panels would allow DOE to provide for consulting experts as ad hoc panel members. The more difficult question is whether DOE can pay for additional tests or examinations. One way to address this would be to leave it up to State law. If the State workers compensation program would pay for additional medical documentation, then the Agreement would set forth a protocol for any Panel right to request it.

14. Proposed section 852.11

CH Comment: The second sentence should be shortened to just "the determination and the findings must be in writing and signed by all panel members," to avoid redundancy and inconsistency with section 852.7. Paragraph 852.11(b)(4) is the determination, not a finding, and should not be included in the list of findings. Also, the reference to (a)(4) in (b)(5) should be (b)(4).

15. Proposed section 852.17

BNL Comment: This section does not provide for the possibility of an appeal by the employer. Where this section indicates "...an applicant..." it is requested that "...or DOE contractor..." be inserted as well.

16. Proposed section 852.18 and Preamble section II.Z What is the Effect of the Acceptance by the Program Office of a Positive Determination by a Physicians Panel?

CH Comments:

Getting States to accept the Physicians Panels' determination of causal connection is probably the greatest "assistance" DOE can provide to applicants. Other "assistance" is not as obvious, and should be identified or at least addressed with a cross-reference to the relevant provisions in the governing State agreement.

A strict interpretation of paragraphs 852.18(b) and (c) is that the contractor may contest a claim until it is accepted as "valid" by the Program Office, and until that time, the cost of contesting the claim is an allowable cost. Moreover, whether or not the contractor contests the claim, any worker's compensation liability remains an allowable cost under the contract. This means that the contractor will have to balance the possibility of unallowable costs of contesting against the possibility of allowable (but possibly mission-impacting) workers compensation liability. We note also that MA has taken the position that DOE directives only apply to contractors subject to the "Laws" clause - i.e., contractors subject to DEAR Part 970 - and that they are only subject to directives to the extent that the directive is incorporated into their contract. Therefore, DOE N 350.6 "Acceptance of Valid Workers Compensation Claims" would not apply to, for example, contractors not subject to the Laws clause, contractors whose contracts terminated prior to the date of DOE N 350.6 [01-12-01], and contractors who otherwise were never subject to DOE N 350.6. A separate "direction" would need to be issued under section 852.18(b).

The Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

OMB is particularly interested in comments on:

- a. The necessity for the proposed collection of information, including whether the information will have practical utility;*
- b. the accuracy of DOE's estimates of the burden;*
- c. ways to enhance the quality, utility, and clarity of the information to be collected; and*
- d. ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.*

CH Comment: None.

17. Review Under Executive Order 13132

As explained in the Preamble, "Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999), imposes certain requirements on Agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Policies that have federalism implications are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government." DOE has determined that this rule does not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government."

CH Comment: It is difficult to understand how a rule that provides for DOE negotiating with States regarding the waiver of their requirements and substitution of Federal requirements doesn't have a "substantial direct effect on the relationship between the National Government and the States." Is it because the States have the right to agree or not agree?